

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

Plaintiffs,

v.

GALE A. NORTON, et al.,

Defendants,

No. C 05-00690 CW

ORDER GRANTING
MOTION TO
TRANSFER

CALIFORNIA FARM BUREAU FEDERATION and
SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY and WESTLANDS WATER
DISTRICT,

Defendant-Intervenors.

Defendant-Intervenors San Luis & Delta-Mendota Water Authority and Westlands Water District (collectively, the Water Agencies) move pursuant to 28 U.S.C. § 1404(a) to transfer this action to the Fresno Division of the Eastern District of California. Plaintiffs Natural Resources Defense Council (NRDC); California Trout; Baykeeper and its Deltakeeper Chapter, Friends of the River; and The Bay Institute (collectively, Plaintiffs) oppose the motion.¹

¹After Plaintiffs filed their opposition to this motion, Defendant-Intervenor California Farm Bureau Federation (Farm Bureau) filed a one-paragraph memorandum joining the Water Agencies' motion to transfer. Two days later, Farm Bureau filed a nine-page reply to Plaintiffs' opposition, largely repeating the

1 Defendants Gale Norton, sued by Plaintiffs in her capacity as
2 Secretary of the Interior, and Matthew Hogan, sued by Plaintiffs in
3 his capacity as Acting Director of the United States Fish and
4 Wildlife Service (FWS), (collectively, Defendants) have not taken a
5 position on the motion.

6 The matter was taken under submission on the papers. Having
7 considered all of the papers filed by the Water Agencies and
8 Plaintiffs, the Court grants the motion to transfer.

9 BACKGROUND

10 Plaintiffs bring this action to challenge FWS' analysis in its
11 June 30, 2004 and February 16, 2005 Operating Criteria and Plan
12 Biological Opinions (OCAPBO). FWS concluded that proposed changes
13 to the coordinated operations of the Central Valley Project (CVP)
14 and State Water Project (SWP), which provide water to much of
15 California, would not harm the delta smelt, a fish listed under the
16 Endangered Species Act (ESA). Plaintiffs allege that the OCAPBO's
17 analysis is arbitrary, capricious and an abuse of discretion in
18 violation of the ESA section 7, its implementing regulations and
19 the Administrative Procedure Act (APA), 5 U.S.C. § 706(2).
20 Plaintiffs further allege that the Service failed to consider
21 whether the proposed agency action would adversely impact the delta
22 smelt habitat and the recovery of the smelt, and failed to consider
23 the available scientific data and the full effects of the action.

24 _____
25 arguments made by the Water Agencies.

26 Plaintiffs move to strike this reply as untimely. Farm Bureau
27 opposes the motion to strike. The Court denies Plaintiffs' motion
28 to strike as moot; Farm Bureau's filing does not offer any
substantial new arguments or evidence that would cause Plaintiffs
prejudice, and it was not considered in the Court's decision.

1 The Water Agencies seek an order transferring this action to
2 the district court where a similar case is pending, San Luis &
3 Delta-Mendota Water Authority and Westlands Water District v. U.S.
4 Department of the Interior, et al., No. CIV F-02-6461 OWW/DLB
5 (hereinafter San Luis). San Luis was filed by the Water Agencies
6 on November 22, 2002, and is assigned to Judge Oliver W. Wanger.
7 Plaintiffs NRDC and Baykeeper are defendant-intervenors in that
8 action.

9 The first claim in the Water Agencies' complaint sought the
10 government's performance of a five-year status review of the delta
11 smelt as required by the ESA. The Water Agencies' original
12 complaint also brought two additional claims challenging the
13 criteria used in the delta smelt Recovery Plan, for violation of
14 the ESA section 4(f)(1)'s requirement that criteria be objective
15 and measurable, and in the alternative as arbitrary and capricious.

16 FWS agreed to perform the status review, which was completed
17 on March 31, 2004, settling the first claim in the Eastern District
18 action. The Water Agencies then filed a supplemental complaint
19 challenging the results of the status review, on the grounds that
20 FWS' review failed to meet the requirements of the ESA, and in the
21 alternative was arbitrary and capricious, and that FWS effectively
22 amended its criteria in the Recovery Plan without first providing
23 notice and an opportunity to comment. Dispositive motions in San
24 Luis have not yet been filed or scheduled. O'Hanlon Decl. ¶ 2.

25 Judge Wanger has a great deal of experience with disputes
26 arising out of the CVP. As he has noted, "The issues of CVP
27 capacity and water allocation priorities have been the subject of
28

1 over twenty lawsuits in the Eastern District of California,
2 seventeen of which have been venued in this court." Central Valley
3 Water Agency v. United States, 327 F. Supp. 2d 1183, 1209 (E.D.
4 Cal. 2004). Several of the cases heard by Judge Wanger involve a
5 biological opinion about the delta smelt. Westlands Water Dist. v.
6 U.S. Dept. of Interior, 850 F. Supp. 1388 (E.D. Cal. 1994); San
7 Luis & Delta-Mendota Water Authority v. United States, CIV F-97-
8 6140 OWW, CIV F-98-5261 OWW; Westlands Water Dist. v. U.S. Dept. of
9 Interior, 275 F. Supp. 2d 1157, aff'd 376 F.3d 853 (9th Cir. 2004).

10 A case similar to San Luis was filed by Defendant-Intervenor
11 California Farm Bureau Federation against the Fish and Wildlife
12 Service in the District of Columbia's federal district court,
13 California Farm Bureau Federation v. Badgley, No. 02-2328 RCL
14 (D.D.C. June 30, 2005) (hereinafter California Farm Bureau).
15 Plaintiffs are also defendant-intervenors in California Farm
16 Bureau. On June 30, 2005, two days after Defendant-Intervenor
17 Water Agencies filed the instant motion, the District of Columbia
18 court granted the federal defendants' motion to transfer California
19 Farm Bureau to the Eastern District of California.

20 The Water Agencies do not contend that venue in the Northern
21 District of California is improper. Instead, they argue that
22 transfer to the Eastern District would serve the interests of
23 justice by allowing the issues to be tried most efficiently.

24 LEGAL STANDARD

25 Title 28 U.S.C. § 1404(a) provides as follows: "For the
26 convenience of parties and witnesses, in the interest of justice, a
27 district court may transfer any civil action to any other district
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1 or division where it might have been brought." The statute,
2 therefore, identifies three basic factors for district courts to
3 consider in determining whether a case should be transferred:
4 (1) convenience of the parties; (2) convenience of the witnesses;
5 and (3) the interests of justice. 28 U.S.C. § 1404(a). The Ninth
6 Circuit has held that a fourth factor for the court to consider is
7 the plaintiff's choice of forum. See Securities Investor
8 Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985).
9 The Securities Investor court held that, unless the balance of the
10 § 1404(a) factors "is strongly in favor of the defendants, the
11 plaintiff's choice of forum should rarely be disturbed." Id.; see
12 also Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843
13 (9th Cir. 1986) ("defendant must make a strong showing . . . to
14 warrant upsetting the plaintiff's choice of forum"). The burden is
15 on the defendant to show that the convenience of parties and
16 witnesses and the interest of justice require transfer to another
17 district. See Commodity Futures Trading Comm'n v. Savage, 611 F.2d
18 270, 279 (9th Cir. 1979).

19 DISCUSSION

20 The Court must consider and weigh the three factors listed in
21 section 1404(a) and the fourth identified by the Ninth Circuit in
22 order to determine whether transfer of venue is appropriate in this
23 case.

24 Plaintiffs argue that the convenience of the parties weighs
25 against transfer. Four of the Plaintiff organizations, as well as
26 Plaintiffs' counsel, maintain offices in the Northern District.
27 However, two of the Plaintiffs are already involved in litigation
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1 in Fresno, and none of the Plaintiffs claims that it would be
2 seriously inconvenienced by having to litigate there. Because
3 Plaintiffs show no actual inconvenience, the Court finds that this
4 factor is not relevant here.

5 The Water Agencies argue that the convenience of witnesses,
6 while not a significant factor, weighs in favor of transfer because
7 this case will be decided on an administrative record, the bulk of
8 which is located in the Eastern District. However, the government
9 has already submitted the record to the Court here, in CD format.
10 The Court therefore finds that the convenience of witnesses is not
11 a relevant factor here.

12 The Water Agencies' primary argument is that transfer of venue
13 would serve the interests of justice. First, the Water Agencies
14 argue that the judicial goals of consistency and efficiency would
15 be served by transfer, because both this case and the related
16 pending Eastern District actions involve examination of the same
17 record, the actions are duplicative and could potentially result in
18 conflicting outcomes if tried separately. Second, the Water
19 Agencies show that Judge Wanger of the Eastern District has
20 extensive experience relating to the CVP and delta smelt. For this
21 reason, they argue that the Eastern District would be a superior
22 forum.

23 Plaintiffs correctly note that the cases do not involve
24 identical factual records and legal duties. However, portions of
25 the lengthy administrative record at issue in this action
26 necessarily overlap with those in San Luis and California Farm
27 Bureau, and Plaintiffs do not deny that trying these actions

1 separately could result in inconsistent evaluations of FWS'
2 analysis regarding the delta smelt, the resolution of which would
3 consume additional judicial resources. There will be some
4 duplication of effort if the two cases go forward in separate fora.
5 Because both cases involve detailed administrative records, the
6 amount of judicial effort at stake is considerable. Judge Wanger
7 is certainly more familiar than this Court with the general factual
8 background of the case. While this Court's docket is less crowded
9 than that of the Eastern District, the discrepancy is not so large
10 as to suggest that the case would be resolved there less swiftly.
11 For these reasons, the Court finds that the interests of justice
12 weigh strongly in favor of transfer. Cf. Florens Container v. Cho
13 Yang Shipping, 245 F. Supp. 2d 1086, 1092 (N.D. Cal. 2002) (denying
14 motion to transfer where defendants offered "very little evidence"
15 to disturb plaintiff's choice of forum).

16 This factor must be weighed against the fact that the Northern
17 District is Plaintiffs' preferred forum. Plaintiffs' preference
18 does not weigh heavily. Plaintiffs have shown no inconvenience.
19 Most Plaintiffs are regional, State-wide or national organizations.
20 Plaintiffs cite no case in which a plaintiff's choice of forum
21 outweighed a neutral or strong contrary showing on all other
22 factors. See, e.g., Gulf Oil, 330 U.S. at 508 (plaintiff's choice
23 of forum is to be preserved "unless the balance is strongly in
24 favor of defendant"); Decker Coal, 805 F.2d at 843 (upholding
25 denial of motion to transfer where both fora were inconvenient to
26 the parties and public convenience factors weighed against
27 transfer); Ellis v. Costco Wholesale Corp., 372 F. Supp. 2d 530,

1 540 (N.D. Cal. 2005) (denying motion to transfer based on deference
2 to plaintiffs' choice of forum where convenience factors are
3 mixed); Wilderness Soc'y v. Babbitt, 104 F. Supp. 2d 10, 18 (D.D.C.
4 2000) (finding plaintiffs' choice of forum and national public
5 interest outweigh factors of private convenience). Here,
6 convenience of parties and witnesses are neutral factors, and
7 judicial efficiency strongly favors transfer. Weighing all of the
8 relevant circumstances, the Court finds that Plaintiffs' choice of
9 forum in this case does not outweigh the interests of judicial
10 efficiency.

11 CONCLUSION


12 For the foregoing reasons, the Water Agencies' motion to
13 transfer is GRANTED (Docket No. 77). Plaintiffs' motion to strike
14 is DENIED as moot (Docket No. 111). The Water Agencies' request
15 for judicial notice of the San Luis complaints and docket is
16 GRANTED (Docket No. 79). Farm Bureau's request for judicial notice
17 is DENIED as moot (Docket No. 109).

18 This case is hereby TRANSFERRED to the Eastern District of
19 California, Fresno Division, pursuant to 28 U.S.C. § 1404(a). The
20 Clerk shall transfer the file.

21
22 IT IS SO ORDERED.

23
24
25 Dated:

SEP - 6 2005

26 
27 CLAUDIA WILKEN
28 United States District Judge